Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Reorganization and Revision of	)	WT Docket No. 94-148
Parts 1, 2, 21, and 94 of	)	
the Rules to Establish a New	)	
Part 101 Governing Terrestrial	)	
Microwave fixed Radio Services	)	

COMMENTS OF TELECOM SERVICES GROUP, INC.

Telecom Services Group, Inc. ("TSGI")[1] by its attorneys, hereby respectfully submits its Comments in the above-captioned proceeding. In regard thereto, it is stated as follows:

1. TSGI Is Concerned that the Proposed Rules Do Not Fully Comply with the Mandatory Requirement of Section 214 of the Communications Act.

A. TSGI is a Common Carrier Operator.

As the attached map of the TSGI system shows, TSGI, by means of its six (6) subsidiary microwave common carriers, operates an interconnected system serving a large portion of the United States. TSGI is a carrier's carrier, i.e. its customers are not end-users, but rather other carriers who offer their telecommunications services in competition with such IXC carriers as AT&T or MCI. While many of TSGI's customers own and operate their own facilities, sometimes these customers have found that,in order to offer low cost service to their customers, it is a better business practice to offer the service, in whole or in part, by leasing channel capacity from another carrier (a carrier's carrier service agreement).[2]

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[1] TSGI is a "long-haul" microwave common carrier. Proposed 47 C.F.R. §101.3 defines a "long-haul" system as: "A microwave system licensed under this Part in which the longest radio circuit of tandem radio paths exceeds 402 kilometers (250 miles)."

[2] This type of carrier's carrier arrangement was analyzed in considerable detail in the recent decision ACC Long Distance Corp. v. Yankee Microwave, Inc., (continued)

While it is true that before the introduction of long haul fiber optic systems long haul microwave systems were the primary providers of interstate common carrier service, such microwave systems still represent a very significant portion of the nation's telecommunications infrastructure. It is laudatory for the Commission to adopt new rules simplifying the regulation of microwave service. However, ultimately this may not prove fruitful, or may even prove self-defeating, if in doing so the new rules eliminated the prerequisite that the common carrier applicant show that its proposal would meet the statutory standard that its proposed construction is in "the present or future public convenience and necessity . . ." (47 U.S.C. §214).

Moreover, it appears that reading the proposal to modify present rules 47 C.F.R. §21.13(a)(4) and 47 C.F.R. §21.706, in conjunction with 47 C.F.R. §63.07(a), the result of such modification will be more, rather than less, burdensome regulation of common carrier microwave applicants. Indeed the result may be to enable some carriers[3] to indulge in spectrum speculation and warehousing.

B. The Mandatory Requirements of Section 214 of the Communications Act Must Be Met.

In AT&T v. FCC, 978 F. 2d 727 (D.C. Cir. 1992)("AT&T"), the Court struck down the FCC's policy of forbearance by which non-dominant carriers were not required to file tariffs pursuant to 47 U.S.C. §203. There the Court noted that the word "shall" as used in a

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[3] An entity that is a "common carrier"simply means: "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate . . . radio transmission of energy . . ." 47 U.S.C. §153(h). Even, an applicant who is an elderly retired welder, who has no experience whatsoever in the common carrier business is still qualified to be classified as a common carrier for purposes of filing a microwave application. Ellis Thompson Corporation, 7 FCC Rcd 3932, 3934 ¶10 (1992).

statute, is the language of command and only the congress could remove this requirement to file tariffs before offering interstate service. A similar "shall" command is found in 47 U.S.C. §214 by which no carrier "shall" commence construction or operation of an interstate line[4] without first having obtained a certificate that "the present or future public convenience and necessity require . . . the construction and operation of such . . . line." Section 214 has been interpreted to require that before an application can be granted, the FCC make some positive finding that grant of the authorization to create new lines or extend lines is in the public interest[5], not merely that competition per se is in the public interest, FCC v. RCA Communications, Inc. 346 U.S. 86 (1953).

The FCC's present method of having microwave common carriers comply with Section 214 is a simple one and should remain unchanged. Where the carrier proposes to use microwave radio frequencies, then the carrier need not first file an application pursuant to 47 C.F.R. §63.02. This is because 47 C.F.R. §63.07(a) allows the FCC to make the requisite Section 214 public interest finding in the processing of the microwave applications.[6] The information submitted in the form 494 application pursuant to 47 C.F.R. §21.13(a)(4) and 47 C.F.R. §21.706(a) and (b), permits the FCC to find that grant of the application to construct this interstate line will meet the Section 214 standard that the proposal is in the public interest.

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[4] Whether the service is provided by wire or microwave radio makes no difference. 47 U.S.C. §153(h).

[5] The proposed rules address both private and common carrier microwave applications. The higher standard requiring a public interest finding under Section 214 is only applicable to common carriers operating under Title II regulation.

[6] See FCC Form 494, question 21.

The rules proposed in this proceeding eliminate the public interest showing required by Section 214. Proposed rule §101.19(a) mirrors present rule 21.13(a) except in that it eliminates the Section 214 requirement that the applicant: "(4) State specifically the reasons why a grant of the proposal would serve the public interest, convenience and necessity . . .," and also eliminates the requirement that the specific information required for the Section 214 finding must be submitted pursuant to 47 C.F.R. §21.706(a) and (b). The net result is that, despite the fact that an operational fixed microwave applicant (OFS) is not subject to the prerequisite that the FCC make a public interest Section 214 finding, and a common carrier applicant is subject to such a Section 214 prerequisite finding, both applicants are treated as if they were the same and both would be now required to submit only the same limited amount of information.

Thus, as the rules are proposed, it appears that one of three things are true:

> (1) The Commission has determined that it has the legal power to forebear from requiring an interstate microwave common carrier from providing the information which is necessary before the FCC can make a public interest finding pursuant to Section 214. Presumably, this is something the Commission does not intend to do because it apparently does not have the legal right to forebear from enforcement of Section 214 anymore than it had the legal right to forebear from enforcement of Section 203. (AT&T); or
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> (2) The Commission has determined that microwave common carriers need not supply the requisite Section 214 information in the application, thereby requiring them to submit a filing pursuant to 47 C.F.R. §63.02.[7] Presumably, this is something the Commission does not intend, because the Commission obviously did intend to simplify processing of common carrier applications, not to add an unnecessary burden on such processing.
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> (3) Therefore, TSGI must conclude that in the Commission's worthy endeavor to unify and simplify its processing of both the OFS applications and common carrier microwave applications rules it overlooked the fact that

[7] Pursuant to Section 1.1105 n. 11, such a Section 214 filing would require a $705.00 filing fee in addition to the usual fee for each microwave application.

> Section 214 of the Communications Act requires the FCC to review the information now required to be submitted by a common carrier microwave applicant pursuant to 47 C.F.R. §§21.13(4) and 21.706)a) and (g) before the application can be granted.

Because of the mandate of 47 U.S.C. §214, TSGI respectfully submits that the new rules (§§101.19 and 101.713) should mirror the language of present rule 21.706 as it applies to applications for microwave stations filed by common carriers.

C. The Requirement to Make a Showing of Present Need for the Requested Frequencies Is Easily Fulfilled.

In its filling of many FCC Form 494 applications TSGI[8] has found that where there is a present need for the proposed service, it is not inconvenient at all to respond to Question 21 by supplying as Exhibit M the requisite showing that:

(1) In the case of new stations the applicant has a firm order for service from a customer,[9] or

(2) In the case of additional capacity on an existing station the applicant merely sets forth: (a) that which it is presently licensed to operate, e.g. three 6 GHz radios with a total capacity of nine DS-3's, and (b) that it needs an additional radio to fulfill a firm order for service requested by a named customer for two more DS-3's on the existing system requiring an additional microwave radio because it is already providing 8 DS-3's to existing customers.

While the frequency band 5925-5425 MHz (the work horse channels of the long haul common carrier microwave industry) is intended to be used only by "common carriers,"

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[8] TSGI, through its operation of six subsidiary corporations, controls the day-to-day operation of over three (300) hundred common carrier microwave stations.

[9] Typically in such a showing, TSGI simply states that it has received an order e.g. 2 DS-3's from an identified customer requesting service between points "A" and "B" for which all new facilities are required to be constructed.

anyone can file an application requesting such a channel, claiming to offer service as a common carrier. The greatest frustration in frequency coordination of a long haul microwave system is in finding that while eleven of twelve proposed stations can be frequency coordinated, one of the twelve cannot. If the one cannot be cleared because the frequency is presently utilized, then so be it, and the service cannot be provided. However, if the frequency cannot be cleared because it is held by a permittee who is a spectrum speculator[10] or a warehouser of spectrum, that is clearly not in the public interest. In the absence of a present need showing in an application there is a very real possibility that such frequencies will be applied for by those who have no present need for them, but are merely "warehousing" or spectrum speculating. Indeed, the scarcer microwave channels become because of such illicit conduct, the greater the temptation becomes to profit from such illicit conduct because the channel has a greater market value. A long-haul common carrier microwave system is unique in this regard. If in the theoretical situation described supra, the one channel necessary to complete a twelve channel system is held by a spectrum speculator, then that one channel has inflated value because it is the key to the entire project.

The FCC's broadcast rules prevent spectrum speculation because a permittee can recover no more than its proven out of pocket expenses when it seeks FCC consent to the assignment of the permit (See, 47 C.F.R.§73.3597(b)(2)). The FCC's common carrier rules contain no such blanket prohibition against selling a permit for profit (See, 47 C.F.R. §21.39(a)).

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[10] A spectrum speculator is an applicant who files an application for the purpose of selling the permit for a profit, rather than providing service. A warehouser is an applicant who seeks to acquire frequencies for anticipated future need rather than present need.

Therefore, in light of both the statutory requirement of Section 214 and also as an inhibitant of abuse by spectrum speculators it is respectfully submitted that the public interest lies in continuing to require that common carrier microwave applicants show present need for the proposed service.

II. The Elimination of the Requirement for Showing the Existence of Maintenance Procedures Is Not in the Public Interest.

Proposed rule Section 101.21, which is to replace Section 21.15, eliminates the maintenance procedure showing required by present Section 21.15(e). A microwave system cannot be simply placed into operation following receipt of a conditional license with the assurance that no future adverse conditions will be created. Such stations can and do occasionally "drift" out of "bandwidth." As a result of such "drift" the licensee's service to its customers deteriorates and interference to other common carrier stations is created.

For this reason, present Section 21.15(e) serves two purposes:

First, the Commission is only authorized to fine a station or revoke a license for violation of its rules. (See 47 U.S.C. §503). If there is no rule requiring the licensee to maintain its system then there is no means to preclude "cheap and dirty" operation which are injurious to not only the carrier's own customers, but also to other common carriers because no rule has been violated.

Second, the requirement that the applicant list the location and telephone number of the maintenance center serves a very useful purpose. First, it reminds applicant's that they must have a means to ensure that equipment is properly maintained or be subject to a fine or revocation. Second, it provides a source of information to other carriers that permits them to

immediately contact the suspected culprit when interference starts to occur because a station is drifting from its bandwidth or from other causes.

III. Automatic Transmission Power Control (ATPC).

At ¶18 of the NPRM the FCC considers authorizing ATPC. If ATPC is approved, TSGI respectfully submits that the frequency coordination requirements set forth in proposed rule Section 101.713 should be modified to require clearance at maximum transmitter power, not just nominal power. TSGI is concerned that a proposed ATPC system may clear many potential interference cases with a nominal power frequency coordination, but when run with the 3 dB increase in power, interference levels may cause existing systems to degrade below acceptable levels. The 3 dB increase in an interfering signal from an ATPC transmitter when surrounding systems (that may not be equipped with ATPC) have also faded down could knock the surrounding systems off the air.

IV. The Period of Time in Which to Complete Assignments of Licenses is too Short.

One ministerial matter that TSGI would request that the Commission consider is that proposed rule §101.15(e) (presently §21.7(d)) be modified to allow a period of sixty (60) days to complete assignments.[11] The reason for this proposal is that such assignments generally involve a large sum of money. For this reason, neither the parties to the sale nor the lender is willing to close following FCC grant of the assignment application until the grant of the application is a "final order." This is generally defined in the sales contract as a grant of the FCC application which is no longer subject to administrative or judicial review. The grant

[11] The Mass Media Bureau's "policy" in this regard is to give 60 days to close as is reflected in FCC Form 732. There is no rule which specifies the requisite time contained in Part 73.

legally becomes final forty-one days after the notice of the grant has appeared in the public notice (See, 47 C.F.R. §1.117). For this reason, it is frequently necessary to request an extension of the time in which to close because forty-five days have expired following staff action, but that date is less than forty-one days after public notice of the grant was given. This unnecessary burden on the FCC's process to extend the closing date would be largely eliminated if 47 C.F.R. §101.15(e) provided sixty (60) days rather than forty-five (45) days in which to close.

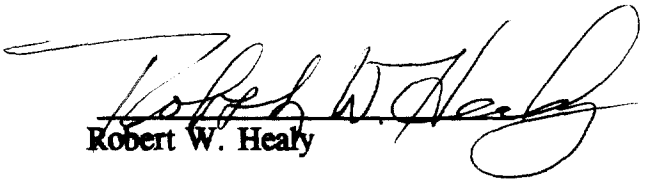
V. Conclusion.

These are some rules that should be eliminated because they do more harm by creating a regulatory burden, then they do good by eliminating a problem. There are some rules that should be eliminated simply because new technology has made them obsolete. However, no rule should be eliminated that serves a useful purpose in order solely to simplify the regulatory process.

TSGI is a major microwave common carrier. TSGI would be the first to support the elimination of unnecessary rules. However, in the Notice of Proposed Rulemaking the Commission proposes to eliminate two rules that serve a real purpose: (1) a showing of present need for the proposed service, and (2) a showing that the proposed system will be properly maintained. TSGI believes that complying with the rules creates very little burden on the applicant and provides a great deal of protection against spectrum speculation or potential interference. For this reason, it is respectfully submitted that the public interest lies in retaining these rules rather than eliminating them.

Respectfully submitted,

TELECOM SERVICES GROUP, INC.



Robert W. Healy

Its Attorney

SMITHWICK & BELENDIUK, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036

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ATTACHMENT 1

TELECOM SERVICES GROUP, INC.